No. 16-1362

IN THE
Supreme Court of the United States

ENCINO MOTORCARS, LLC,
Petitioner,

v.

HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who regularly teach and write about employment and labor law.[2] *Amici* have no stake in the outcome of this case other than their scholarly interest in the logical and rational development of the law. Because the proper interpretation of the Fair Labor Standards Act of 1938 ("FLSA") implicates fundamental issues of employment and labor law, *amici* believe that their perspective may assist the Court in resolving this case.

SUMMARY OF ARGUMENT

Petitioner contends that service advisors like respondents are not entitled to overtime pay because "the broader scheme of the FLSA" is to exempt commissioned employees and it is "reasonable for salespeople to be compensated based on their success at selling." Pet. Br. 32-33 (emphasis omitted). Petitioner further contends that an affirmance would upset "longstanding compensation arrangements" based on "long-settled industry practices." *Id.* at 52. The problem with these contentions, however, is that they are subordinate in any legal analysis to the FLSA's text, structure, and purpose. As the Ninth Circuit recognized in this case, the FLSA's text, structure, and purpose lead to the conclusion that service advisors like respondents are entitled to overtime pay.

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[1] The parties have consented to the filing of this brief, and letters expressing their blanket consent to the filing of *amicus* briefs have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A full list of *amici*, including their institutional affiliations, is set forth in the Appendix to this brief.

I. Congress enacted the FLSA in 1938 to offer employees throughout this country legal protections that were expansive and in many respects revolutionary. For example, the FLSA for the first time declared a national minimum wage, forbade the use of child labor, established maximum hours that workers could remain on the job each week, and mandated overtime pay for hours on the job in excess of the maximum. Fair Labor Standards Act of 1938, ch. 676, §§ 6, 7, 12, 52 Stat. 1060, 1062-64, 1067; *see* 29 U.S.C. §§ 206, 207, 212. This Court recognized the ambition and significance of the FLSA early on, noting that it endeavored "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation." *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 510 (1950).

II. The FLSA is designed to apply to all employees — including commissioned employees and salespersons — who are not expressly exempted. Accordingly, the scope of the FLSA's overtime protection is broad, *see* 29 U.S.C. § 207(a)(1), and the exemptions to its coverage are "narrow and specific." *Powell*, 339 U.S. at 516. This Court has understood that "[s]uch specificity in stating exemptions [to the FLSA] strengthens the implication that employees not thus exempted . . . remain within the Act." *Id.* at 517.

III. When Congress intended to exempt commissioned employees and salespersons from coverage under the FLSA, it did so expressly. *See* 29 U.S.C. § 207(i). Likewise, when Congress intended to exempt relatively well-paid employees, it did so expressly. *See, e.g., id.* §§ 207(i)(1), 213(b)(24). But, in the absence of such an express exemption, the nature and amount of an employee's compensation is irrelevant to the question whether the FLSA's overtime provisions apply. *See Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167 (1945)

("[E]mployees are not to be deprived of the benefits of the Act simply because they are well paid.").

IV. There is no compelling policy rationale to deviate from the text, structure, and purpose of the FLSA to deny respondents their statutory right to overtime pay. Automobile dealers could not reasonably have expected service advisors to fit within the FLSA's exemption to overtime pay for "any salesman . . . primarily engaged in selling or servicing automobiles [or] trucks," 29 U.S.C. § 213(b)(10)(A), when the Department of Labor's formal regulatory interpretations have instructed otherwise for almost 50 years. *See* 35 Fed. Reg. 5856, 5896 (Apr. 9, 1970) (codified at 29 C.F.R. § 779.372(c)(4) (1971)). Moreover, the FLSA's overtime provisions do not yield to incompatible industry norms. The FLSA was enacted to displace incompatible industry norms, and so it would be perverse to let industry norms prevail in this case.

There is also no fundamental unfairness to petitioner in applying the FLSA's overtime provisions to service advisors like respondents. The Portal-to-Portal Act of 1947 protects against unfair application of the FLSA to actions taken in good-faith reliance on prior agency interpretive statements, *see* 29 U.S.C. § 259, assuaging concerns about unfair retroactive liability. Automobile dealers, like other employers, are obligated to maintain wage-and-hour records necessary to calculate overtime pay, *see id.* § 211(c), eliminating worries about administrative inconvenience. And receiving overtime pay to which they are statutorily entitled is hardly a windfall for service advisors. Indeed, the fact that petitioner and other automobile dealers have avoided paying statutorily mandated overtime to these employees for 50 years is the real windfall in this case.

ARGUMENT

I. THE FLSA APPLIES BROADLY TO ACHIEVE FAR-REACHING AND FAR-SIGHTED OBJECTIVES

Congress enacted the FLSA in 1938 to implement employee protections that were expansive and revolutionary. As this Court has noted, "[t]he Act declared its purposes in bold and sweeping terms," *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 516 (1950), acting "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation," *id.* at 510. To achieve those expansive purposes, the FLSA established a national minimum wage, forbade the use of child labor, established maximum hours that workers could work each week, and mandated overtime pay for time worked in excess of the maximum hours. Fair Labor Standards Act of 1938, ch. 676, §§ 6, 7, 12, 52 Stat. 1060, 1062-64, 1067; *see* 29 U.S.C. §§ 206, 207, 212.

Congress intended the FLSA's protections to apply to a broad array of American workers. *See United States v. Darby*, 312 U.S. 100, 109 (1941) (the FLSA "set up a comprehensive legislative scheme"); *Powell*, 339 U.S. at 516 ("Breadth of coverage was vital to [the FLSA's] mission. Its scope was stated in terms of substantial universality . . . ."). Because breadth of coverage was foundational to the Act's purposes, exceptions to coverage "were narrow and specific." *Powell*, 339 U.S. at 517. Indeed, President Franklin D. Roosevelt deemed the FLSA "the most far-reaching, far-sighted program for the benefit of workers ever adopted here or in any other country," "[e]xcept perhaps for the Social Security Act." 1938 PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT 392 (Samuel I. Rosenman ed., 1941).

To ensure that the FLSA was implemented as broadly as its purposes and goals required, Congress established expansive record-keeping requirements for employers. *See* 29 U.S.C. § 211. In particular, the FLSA states that "[e]very employer subject to any provisions of this chapter . . . shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him." *Id.* § 211(c).

II. THE FLSA'S BROAD PROTECTIONS EXTEND TO ALL COVERED EMPLOYEES UNLESS THEY ARE EXPLICITLY EXEMPT, AND THE AMOUNT OF PAY IS NOT RELEVANT UNLESS EXPLICITLY INCLUDED IN A STATUTORY EXEMPTION

By design, the FLSA applies broadly to virtually all employees — including commissioned employees and salespersons — unless they are expressly exempted. The scope of the FLSA's overtime protection is broadly crafted, *see* 29 U.S.C. § 207(a)(1), and the exemptions to this broad coverage are "narrow and specific." *Powell*, 339 U.S. at 516. This Court has stated that "[s]uch specificity in stating exemptions [to the FLSA] strengthens the implication that employees not thus exempted . . . remain within the Act." *Id.* at 517. *Cf. Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012). Thus, petitioner's suggestion (at 32-34) that the amorphous "structure and broader purposes" of the FLSA indicate that service advisors[3] were not intended to be covered by the Act is unavailing.

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[3] Respondents are employees who meet and greet customers at automobile dealers, listen to and evaluate their complaints about their vehicles' operations, evaluate their service or repai

A. Commissioned Employees And Salespersons Are Exempt From The FLSA Overtime Rules Only When They Fall Within Explicit Exemptions

When Congress intended to exempt commissioned employees and salespersons from coverage under the FLSA, it did so expressly. For example, Section 7(i) of the FLSA creates an exemption from the Act's general overtime pay coverage for certain retail and service establishments with employees who work on commission. *See* 29 U.S.C. § 207(i). Under Section 7(i), employers do not violate the overtime provisions if they employ an employee in a retail or service establishment in excess of the maximum hours so long as:

> (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 . . . and (2) more than half [the employee's] compensation for a representative period (not less than one month) represents commissions on goods or services.

Id. Similarly, Section 13 exempts certain salespeople from the FLSA's general overtime pay provision. *See Id.* § 213(a)(1), (b)(10)(A)-(B). Section 13(a)(1) exempts "any employee employed . . . in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary)." *Id.* § 213(a)(1).[4] Section 13(b)(10)(B) exempts "any

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needs, and write up estimates for requested service. This job is variously referred to as service advisor, service manager, or service salesman. Throughout this brief we will refer to the job as service advisor.

[4] An "outside salesman" has been further defined as an employee "[w]ho is customarily and regularly engaged away from the employer's place or places of business in performing [his or her] primary duty," 29 C.F.R. § 541.500(a)(2), and whose primary

salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers." *Id.* § 213(b)(10)(B). Section 13(b)(10)(A) exempts only "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles." *Id.* § 213(b)(10)(A). Unless this provision can be interpreted as expressly exempting service advisors, they do not become exempt employees based on petitioner's unsubstantiated assertions concerning the "structure and broader purposes" of the Act.

The history of Section 13(b)(10)(A) confirms that it cannot be interpreted as an express exemption for service advisors. Prior to the Fair Labor Standards Amendments of 1966, all employees of automobile dealers were exempted from the FLSA overtime provisions. *See* 29 U.S.C. § 213(a)(19) (1964). But, in 1966, Congress narrowed this exemption to apply to "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). Importantly, this exemption is narrower than other provisions proposed and rejected by Congress during the 1966 amendment process. For example, one amendment proposed in 1965 would have exempted "*any salesman or mechanic* employed by an establishment which is primarily engaged in the business of selling automobiles, trucks, or farm

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duty is either (i) making "sale[s], exchange[s], contract[s] to sell, consignment[s] for sale, shipment[s] for sale, or other disposition[s]," 29 U.S.C. § 203(k), or (ii) "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer," 29 C.F.R. § 541.500(a)(1). If an employee is paid on commission but is not an "outside salesman," he is not exempted from the FLSA's minimum wage provision by this provision.

implements to the ultimate purchaser." H.R. 10518, 89th Cong. § 209 (1965) (emphasis added); *see* H.R. Rep. No. 89-871, at 67 (1965). Thus, Congress considered language that would have somewhat narrowed the automobile dealers exemption while still exempting service advisors — who would fall within the category of "any salesman" — but Congress ultimately rejected that formulation. Congress instead adopted language that exempts only certain salesmen employed by automobile dealers — namely, those who are primarily engaged in selling automobiles.

B. An Employee's Annual Income Is Irrelevant In Deciding Whether The Employee Is Exempt From The FLSA's Overtime Provision Unless The Statute Or Regulations Expressly Provide Otherwise

Congress expressly defined the scope of some exemptions from the FLSA's overtime provisions in part by the amount that a worker is paid. *See, e.g.*, 29 U.S.C. §§ 207(i)(1), 213(b)(24). A worker's pay level is also relevant under some of the Department of Labor's regulations. *See, e.g.*, 29 C.F.R. §§ 541.100(a)(1), 541.200(a)(1), 541.300(a)(1). But, in the absence of such an express provision, the amount a worker is paid is irrelevant when deciding whether the FLSA's overtime provisions apply. As this Court has explained, "employees are not to be deprived of the benefits of the Act simply because they are well paid." *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167 (1945).

In suggesting that relatively well-paid workers are not entitled to the statutory protection of the FLSA, petitioner errs (at 34) in focusing on only one of the FLSA's core concerns. To be sure, the FLSA sought to protect workers from inadequate wages — but that

was accomplished primarily through the minimum wage provisions. *See, e.g.*, 29 U.S.C. § 206. The overtime provisions were intended to create an incentive for employers to hire more employees, each of whom would work fewer hours, rather than to hire fewer employees working longer hours. *See Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944) ("[T]he Congressional purpose in enacting Section 7(a) was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay requirement, and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act.") (citation omitted).[5] An employee's pay level is irrelevant to that goal.

This Court long has recognized that "an intended effect [of the FLSA] was to require extra pay for overtime worked by those covered by the act even though their hourly wages exceeded the statutory minimum. . . . [The Act] calls for 150% of the regular, not the minimum wage." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577 (1942), *superseded on other grounds by statute as stated in Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 n.22 (1985); *see also*

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[5] *See also* Ronald G. Ehrenberg & Paul L. Schumann, *The Overtime Pay Provisions of the Fair Labor Standards Act*, *in* THE ECONOMICS OF LEGAL MINIMUM WAGES 266 (Simon Rottenberg ed., 1981) ("[T]hroughout the early 1930s bills were repeatedly introduced into Congress to limit the length of the workweek. While the goal of protecting existing employees from the ills associated with excessive fatigue remained, a second explicit purpose of such legislation was to increase employment by distributing the available work."); Robert D. Lipman et al, *A Call for Bright-Lines to Fix the Fair Labor Standards Act*, 11 HOFSTRA LAB. L.J. 357, 359-60 (1994) ("Congress believed that requiring employers to pay an overtime premium whenever an employee worked over forty hours in a workweek would motivate employers to hire additional workers rather than pay the overtime penalty.").

Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 93 (1942) (emphasizing that a drilling crew on an oil rig was entitled to overtime compensation despite earning far above the minimum wage). An employee "unless specifically exempted [is] entitled to whatever benefits the overtime provisions confer[]." *Missel*, 316 U.S. at 575. Unless an employee's earnings are part of the definition of an exemption, therefore, they have no bearing on the entitlement to overtime compensation under the FLSA.

The regulations reinforce that principle. For example, 29 C.F.R. § 541.3(a) provides a non-exhaustive list of blue-collar and service workers who "are entitled to minimum wage and overtime premium pay under the [FLSA], and are not exempt under the regulations in this part no matter how highly paid they might be." Those employees are entitled to overtime pay not because of low earnings, but because they worked a high number of hours. Service advisors are in the same position. They are entitled to overtime pay because of how many hours they have worked, not because of how little they are paid. Their pay is simply irrelevant to the exemption claimed.[6]

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[6] This is the case even if the employee earns more than the advisors at issue in this case. For example, in *Gorey v. Manheim Services Corp.*, 788 F. Supp. 2d 200 (S.D.N.Y. 2011), commissioned employees of an automobile auction house were held to be covered by the FLSA overtime provisions, even though some of them made $77,000 per year without overtime — which is more than the $68,995 average that petitioner suggests (at 34) is too high to justify FLSA overtime pay. *See* 788 F. Supp. 2d at 204, 206-09 (holding that employees at issue did not qualify for either outside salesman or administrative exemptions to overtime rules).

III. THE FLSA'S BROAD OVERTIME PROVISIONS ROUTINELY COVER EMPLOYEES WHO RECEIVE COMMISSIONS, AND SUCH COVERAGE DOES NOT PLACE AN UNDUE BURDEN ON EMPLOYERS

Congress expressly exempted some narrowly defined categories of employees from the FLSA's overtime provisions. A few of those categories include commissioned employees. It is therefore a simple task to cite — as petitioner does (at 32) — isolated examples of "individuals engaged in sales or paid on a commission basis" who are also exempt from the FLSA's overtime provisions. But it would be a fallacy to conclude that the express exemption of some commissioned employees justifies a broader exemption of commissioned employees generally.

Petitioner errs in suggesting that employees who satisfy the precise requirements of Section 7(i) or 13(a)(1) of the FLSA are exempt because "the broader scheme of the FLSA" is to exempt commissioned employees or because it is "reasonable for salespeople to be compensated based on their success at selling." Pet. Br. 32-33 (emphasis omitted). Rather, Congress made an explicit policy decision to exempt precisely those employees. Congress easily could have exempted all commissioned employees but chose not to do so. On the contrary, commissioned employees — including highly paid employees — routinely have been subject to the FLSA's overtime provisions for many years when they do not fall within an express exemption. Paying overtime wages to commissioned employees has not created practical difficulties for employers that comply with the statute, and following the Department of Labor's longstanding interpretation of Section 13(b)(10)(A) would not impose an unreasonable burden on the industry here.

A. Absent An Express Exemption, Commissioned Employees Routinely Have Been Subject To The FLSA's Overtime Provisions

Employers have recognized that commissioned employees are routinely subject to the FLSA's overtime provisions. For example, the Society for Human Resource Management, which is "the world's largest HR membership organization" devoted to human resource management,[7] recognizes that commissioned employees are generally entitled to overtime pay and explains to its members how to calculate it. *See* Allen Smith, *Bonuses, Commissions Included in Regular Rate of Pay Calculation*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Sept. 17, 2012), https://www.shrm.org/legalissues/federalresources/pages/regular-rate.aspx. Even the trade publication for automobile dealers recognized not only that commissioned employees generally may be entitled to overtime pay but also that "service advisor[s]" are "not exempt" from the FLSA's overtime provisions. Justin Spath, *Automotive Wage Compliance in the Dealership: Minimum Wage Law Does Apply*, AUTO DEALER TODAY (Dec. 2007), http://www.autodealermonthly.com/channel/dps-office/article/story/2007/12/automotive-wage-compliance-in-the-dealership-minimum-wage-law-does-apply.aspx.

The wide range of reported decisions in which the FLSA's overtime provisions routinely covered commissioned employees illustrates the statute's application to employees who do not fall within an express exemption. For example, when "routemen" who deliver bottled drinks to stores did not satisfy the

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[7] About the Society for Human Resource Management, https://www.shrm.org/about/pages/default.aspx (last visited Dec. 4, 2017).

"outside salesman" exemption of Section 13(a)(1), the workers were entitled to overtime pay even though the employer "paid its routemen a flat fee plus commissions based on volume." *Hodgson v. Klages Coal & Ice Co.*, 435 F.2d 377, 382 (6th Cir. 1970).

Similarly, when firework-stand employees did not fall under the Section 13(a)(3) "amusement or recreational establishment" exemption or the Section 13(a)(1) "administrative personnel" exemption, they were entitled to overtime pay even though they were paid on commission. *See Dole v. Mr. W Fireworks, Inc.*, 889 F.2d 543, 545-47 (5th Cir. 1989).

In *Brennan v. Valley Towing Co.*, 515 F.2d 100 (9th Cir. 1975), a towing company's wrecker-drivers who received a commission were still entitled to overtime pay under the FLSA when the employer "failed to establish any exceptions or exemptions taking them out of the Act's coverage." *Id.* at 103-04. *See also, e.g.*, *Hodgson v. Baker*, 544 F.2d 429, 433-34 (9th Cir. 1976) (tow-truck drivers who received commissions were entitled to overtime pay under the FLSA when the Section 13(a)(1) bona fide executive exemption did not apply).

Further examples, from a diverse range of fields, include retail store managers paid a weekly salary and additional performance-based commissions, *see Lalli v. General Nutrition Ctrs., Inc.*, 85 F. Supp. 3d 560, 561 (D. Mass. 2015), *aff'd*, 814 F.3d 1 (1st Cir. 2016); a delivery man receiving a commission, *see Miranda-Albino v. Ferrero, Inc.*, 455 F. Supp. 2d 66, 77-79 (D.P.R. 2006); gas station operators who received commissions based on the amount of gasoline sold, *see Marshall v. Truman Arnold Distrib. Co.*, 640 F.2d 906, 908-09 (8th Cir. 1981); and yacht salesmen employed

to work irregular hours and paid strictly on a commission basis, *see Brennan v. Lauderdale Yacht Basin, Inc.*, 493 F.2d 188, 189 (5th Cir. 1974). Despite the varied industries in which they worked, those employees all had three things in common — they were paid commissions, they did not fall within an explicit FLSA exemption, and they were entitled to overtime pay.

B. Calculating Overtime Pay For Commissioned Employees Is Simple, And Automobile Dealers Are Legally Required To Keep The Records Necessary For Completing The Calculations

The Department of Labor provides clear, straightforward rules to calculate overtime pay for commissioned employees. *See* 29 C.F.R. §§ 778.118-778.122. Those rules apply regardless of whether an employee is paid solely on commission or on a combination of commission and either a salary or hourly wages. *See id.* § 778.117.

For a commission-based employee whose commissions are paid weekly, 29 C.F.R. § 778.118 explains the three steps required to calculate overtime pay. First, the employer divides the employee's total weekly earnings (the sum of the employee's salary, hourly wages, and commissions) by the number of hours worked that week. That establishes the employee's regular rate of pay for that week. Second, the employer divides that regular rate by two to determine the overtime rate of pay — the extra compensation the employer owes for each hour in excess of 40 the employee worked that week. Finally, the employer multiplies that overtime rate by the number of overtime hours worked to calculate the employee's total overtime pay.

A simple example illustrates the process. Suppose a service advisor works 50 hours in a given week and earns $500 (including commissions). To calculate the overtime pay, the dealership follows the three steps:

1. The dealership divides $500 by 50 hours to find the service advisor's regular rate of pay:

   $500 / 50 hrs. = $10/hr.

2. The dealership divides $10/hr. by two to determine the overtime rate of pay:

   $10/hr. / 2 = $5/hr.

3. The dealership multiplies $5/hr. by 10 hours to calculate the total amount of overtime compensation the service advisor has earned:

   $5/hr. * 10 hrs. = $50.

The service advisor is therefore entitled to $50 of overtime pay and should be paid $550 total for that week. The process is repeated each week the service advisor works more than 40 hours. The overtime calculation is not complicated; it involves only three steps, and the calculations are elementary.

The FLSA requires all employers to record the two pieces of information necessary to these calculations — the employee's total weekly hours worked and total weekly wages earned. 29 U.S.C. § 211(c); *see Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305 (1953). Specifically, any employer with employees subject to the minimum wage or overtime provisions of the FLSA[8] must maintain and preserve records containing "[h]ours worked" each workday and workweek, and the "[t]otal daily or

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[8] Automobile dealers fall within this category because even their employees who are exempt from the Act's overtime provisions are subject to the minimum wage rules. *See* 29 U.S.C. § 206.

weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation." 29 C.F.R. § 516.2(a)(7)-(8). The Department of Labor has made compliance with those requirements easier by providing the necessary information in an accessible and digestible fact sheet. *See* Wage & Hour Div., U.S. Dep't of Labor, *Fact Sheet #21: Record Keeping Requirements under the Fair Labor Standards Act (FLSA)* (revised July 2008), http://www.dol.gov/whd/regs/compliance/whdfs21.pdf.[9]

Employers must record their employees' weekly hours worked and weekly wages earned even if they are excused from complying with § 516.2's other record-keeping requirements on the ground that their employees are exempt from the overtime provisions under Section 13. *See* 29 C.F.R. § 516.12; *see also* 29 U.S.C. § 211(c); 29 C.F.R. § 516.2; *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). Even if automobile dealers honestly believed that service advisors fall under the Section 13(b)(10)(A) exemption, therefore, they had no basis for failing to record service advisors' weekly hours worked and

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[9] Employers also have a powerful incentive to comply with their legal obligations. An employer that fails to keep an accurate record of the hours worked by a commissioned employee cannot meet the burden of proof required to establish that the Section 7(i) exemption applies to that employee. *See* 29 C.F.R. § 516.16; Wage & Hour Div., U.S. Dep't of Labor, *Fact Sheet #20: Employees Paid Commissions By Retail Establishments Who Are Exempt Under Section 7(i) From Overtime Under The FLSA* (revised July 2008), http://www.dol.gov/whd/regs/compliance/whdfs20.pdf.

wages earned.[10] All automobile dealers are accordingly required to maintain records of the information necessary to compute overtime pay for service advisors.[11] Completing the three simple calculations necessary to compensate service advisors with the overtime pay to which they are entitled would not be burdensome.

IV. INTERPRETING THE FLSA TO COVER SERVICE ADVISORS WILL NEITHER DISRUPT SETTLED EXPECTATIONS NOR IMPOSE UNDUE RETROACTIVE LIABILITY ON EMPLOYERS

The FLSA overtime provisions apply even in the face of "settled industry practices." Pet. Br. 52. Petitioner and its *amici* are incorrect to argue that applying the FLSA overtime provisions to service advisors would disrupt settled expectations and open dealers to retroactive liability. Moreover, the Department of Labor regulatory interpretations of Section 13(b)(10)(A) have given employers no basis for establishing expectations that service advisors would be treated as exempt.

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[10] Section 516.12 excuses employers from recording the regular hourly rate of pay for Section 13 exempt employees, but that number readily can be calculated from information that a dealership is required to record, as demonstrated by step one of the overtime pay calculation noted above.

[11] Most courts that have addressed the issue have concluded that the record-keeping burden cannot be shifted to the employees and cannot be delegated or discharged. *See, e.g., Castillo v. Givens*, 704 F.2d 181, 194 (5th Cir. 1983).

A. Longstanding Compensation Practices Do Not Create An Exemption From The FLSA's Overtime Provisions Because Employees Cannot Waive Those Provisions

"[P]reviously agreed-upon compensation arrangements" that purport to rely on commissions in lieu of overtime pay do not undermine the validity of respondents' claims under the FLSA. *See* NADA Br. 15-16. "This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740-41 (1981).[12] Accordingly, this Court consistently has held that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Id.* (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945)); *see D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114-16 (1946); *Walling*, 323 U.S. at 42; *Missel*, 316 U.S. at 577.

Nor does petitioner's assertion that those "longstanding compensation arrangements" represent "long-settled industry practices," Pet. Br. 52, diminish the power of respondents' claims to be paid overtime as required under the FLSA. This Court has made clear that "[t]he Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts .... Congress intended, instead, to achieve a uniform national policy of guaranteeing

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[12] The FLSA permits employers and employees to avoid coverage under the Act in certain enumerated situations, none of which is relevant here. *See* 29 U.S.C. § 207(b), (f), (g).

compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." *Barrentine*, 450 U.S. at 740-41 (second and third alterations in original).[13] Not even highly paid employees can waive their FLSA protections through contract or private agreement if otherwise not exempt. *See Jewell Ridge Coal*, 325 U.S. at 167 ("[E]mployees are not to be deprived of the benefits of the [FLSA] simply because they are well paid or because they are represented by strong bargaining agents.").

B. The Department Of Labor's Actions Have Not Created Any Settled Expectations That Service Advisors Are Exempt From The FLSA Overtime Provisions

Since 1970, the Department of Labor's formal regulatory interpretations of Section 13(b)(10)(A) consistently have treated service advisors as non-exempt employees under the FLSA. In 1970, the Department adopted an Interpretive Regulation stating that service managers are not exempt employees under Section 13(b)(10)(A). *See* 35 Fed. Reg. 5856, 5896 (Apr. 9, 1970) (codified at 29 C.F.R. § 779.372(c)(4) (1971)). That interpretive regulation was not altered until 2011, when the Department adopted a final rule after notice and comment that reaffirmed its interpre-

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[13] *See also Brooklyn Sav. Bank*, 324 U.S. at 704 ("Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.").

tation of Section 13(b)(10)(A) not to provide an exemption for service advisors. *See* Final Rule, Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832 (Apr. 5, 2011).

This case is thus unlike *Christopher v. SmithKline Beecham Corp.*, in which "the . . . industry had little reason to suspect that its longstanding practice of treating [these employees] as exempt . . . transgressed the FLSA." 567 U.S. at 157. To the contrary, automobile dealers have had ample notice for five decades that their compensation arrangements with their service advisors are likely unlawful under the FLSA. Industry trade publications demonstrate the widespread understanding within the industry that extant practices did not comply with the FLSA. *See, e.g.*, Justin Spath, *Automotive Wage Compliance in the Dealership: Minimum Wage Law Does Apply*, AUTO DEALER TODAY (Dec. 2007) (noting that "the FLSA specifically describes a group of employees in automotive dealerships that do not qualify for overtime exemptions" and that "'Employees variously described as . . . service writer, service advisor or service salesman . . . are not exempt.' This is probably one of the most common exemption mistakes made in an automotive dealership.") (quoting 29 C.F.R. § 779.372(c)(4) (2007)) (ellipses in original), http://www.autodealermonthly.com/channel/dps-office/article/story/2007/12/automotive-wage-compliance-in-the-dealership-minimum-wage-law-does-apply.aspx.

Neither the 1978 Opinion Letter nor the Department of Labor's 1987 *Field Operations Handbook* justifies petitioner's claim (at 51-54) that enforcing the statute now would unduly upset settled expectations.

In 1978, after a few lower courts rejected the Department of Labor's interpretation of Section 13(b)(10)(A),[14] the Department issued an Opinion Letter stating that "service writers in certain circumstances can be properly regarded as engaged in selling activities." Wage & Hour Opinion Letter WH-467, 1978 WL 51403, at *1 (July 28, 1978). Nine years later, it revised its *Field Operations Handbook* along the same lines. *See* Wage & Hour Div., U.S. Dep't of Labor, *Field Operations Handbook* 24L04-4, Insert No. 1757 (Oct. 20, 1987) ("Employees variously described as service writers, service advisors, service managers, or service salesmen . . . have been construed as within the exemption in Sec 13(b)(10)(A) by two appellate courts (Fifth and Sixth Circuits) and two district courts (in the Eighth and Tenth Circuits). Consequently, [the Wage and Hour Division] will no longer deny the [overtime] exemption for such employees.").

Neither of these documents had the force and effect of law, and thus could not have altered the Department of Labor's 1970 Interpretive Regulation. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Indeed, the Department of Labor makes clear that the *Field Operations Handbook* is not intended to establish interpretive policy or to make any implied or express guarantees to the public, putting the industry on notice of its limited purpose — to advise Department agents of the agency's current enforcement policy. *See* Wage & Hour Div., U.S. Dep't of Labor, *Field Operations Handbook (FOH)* (last updated Aug. 31, 2017) ("The Field Operations Handbook (FOH) is . . . not used as a device for establishing interpretative policy."), http://www.dol.gov/whd/foh/.

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[14] *See, e.g., Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1098 (5th Cir. 1973).

In any event, the Department of Labor's 2008 Notice of Proposed Rulemaking ("NPRM") put petitioner and the automobile dealers industry on notice that the application of the Section 13(b)(10)(A) exemption to service advisors was, at best, unsettled. In the NPRM, the Department explained that "[t]he current regulation . . . states that . . . service manager[s] . . . [are] not exempt under section 13(b)(10)(A)" and proposed to change that interpretation to conform to contrary court decisions. Notice of Proposed Rulemaking, Updating Regulations Issued Under the Fair Labor Standards Act, 73 Fed. Reg. 43,654, 43,658 (July 28, 2008). In 2011, the Department adopted a final rule reaffirming rather than changing its original 1970 interpretation. *See supra* pp. 19-20. After careful consideration of the comments received in response to the NPRM, the Department concluded that the plain text of the exemption "limit[s] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles" and that therefore service advisors were not exempt employees under Section 13(b)(10)(A). 76 Fed. Reg. at 18,838. Because the NPRM made clear that service advisors were *not* exempt under current regulation and that the agency was only *considering* changing that regulation, the fact that the final rule did not adopt the proposed change does not undermine the notice provided by the interpretive guidance contained in the 2008 NPRM. *Cf. Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) ("the Department's recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation makes any such [unfair] surprise unlikely here") (citation omitted).

Finally, the 2011 regulation, promulgated after full notice-and-comment rulemaking, eliminates any

plausible claim that petitioner and automobile dealers might have to reliance on settled expectations or concerns about unfair retroactive liability for their actions after the date the regulation became final. Within *days* of the Department publishing the final rule, industry advisors disseminated working papers updating dealerships on the rule and counseling them to revise their pay structures accordingly.[15]

Contrary to petitioner's claims (at 51-54), applying the FLSA's overtime provisions to service advisors does not impose retroactive liability, create evidentiary difficulties, or provide covered employees with an unjustified windfall. First, the Portal-to-Portal Act of 1947 protects against unfair application of the FLSA to actions taken in good-faith reliance on prior agency interpretive statements. 29 U.S.C. § 259. Second, as noted above, *supra* pp. 15-17, petitioner is obligated by other provisions of the FLSA to maintain all the wage-and-hour records necessary to compute overtime pay for its service advisors. Finally, receiving overtime compensation to which they are statutorily

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[15] *See, e.g.*, Fisher & Phillips LLP, *The FLSA Overtime Exemption for Service Writers* (Apr. 11, 2011) ("Any dealership that does not already have a possible back-up exemption for their service writers — the so-called 'commission-paid retail' employee exemption — should immediately consider taking the steps to claim it"), https://www.laborlawyers.com/the-flsa-overtime-exemption-for-service-writers; Ford & Harrison LLP, *Labor Alert: Department of Labor Reverses Position on Exemption of Service Advisors Working for Automobile Dealerships* (Apr. 7, 2011) ("[I]n order to comply with this new policy, dealerships will have to take into account all earnings for service advisors during the relevant time period including salary plus any commissions to determine the appropriate amount of overtime pay which may be due."), http://www.fordharrison.com/legal-alert-department-of-labor-reverses-position-on-exemption-of-service-advisors-working-for-automobile-dealerships.

entitled can hardly be called a windfall for service advisors. Indeed, the fact that petitioner and other automobile dealers have avoided paying statutorily mandated overtime to these employees for 50 years is the real windfall in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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Brishen Rogers is an Associate Professor of Law at Temple University Beasley School of Law. His scholarship and areas of expertise are in employment and labor Law, corporate law, and torts. Prior to joining the Temple faculty, he was a Climenko Fellow and Lecturer on Law at Harvard Law School. Professor Rogers' scholarship draws on the social sciences and liberal political theory to better understand why and how to regulate labor markets. His current research falls into two streams. The first considers the constitutional and normative dimensions of economic inequality. The second explores how new technologies are both altering the world of work and creating new opportunities for social and political mobilization. Before attending law school, he worked as a community organizer promoting living wage policies.